

Recent Developments

Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination. By Viola Trebicka

In March 1999, the North Atlantic Treaty Organization (NATO) intervened militarily in the Federal Republic of Yugoslavia (FRY) to bring to an end the grave humanitarian situation that the Serbian state had created in Kosovo. More than seven years later, Kosovo is a “province,” legally still part of the Serbian state, though de facto separate from Serbia.¹ Kosovo is currently under the administration of the United Nations Interim Mission in Kosovo (UNMIK), though it has concurrently been building limited but growing indigenous governmental institutions, in the form of the Provisional Institutions of Self-Government (PISG). The Kosovar Albanians, an overwhelming 90% of the population of Kosovo’s two million people, demand the human right to self-determination, which, if achieved, would certainly lead to Kosovo’s secession. However, the Serbs of Kosovo and politicians in Serbia, drawing on principles of sovereignty—among them, territorial integrity—are reluctant to concede any sovereignty over Kosovo and thus to approve of anything more than “substantial autonomy” for the province. This conflict confirms what W. Michael Reisman has observed: that there is a “fundamental contradiction [between] . . . the legal principles of state sovereignty and human rights,”² both of which are securely established by the U.N. Charter and international law, generally. This contradiction lies at the heart of both the controversy over the legality of humanitarian intervention and the post-intervention affairs.

The current risky situation in Kosovo demonstrates why the question of self-determination in the circumstances of a humanitarian intervention needs to be squarely addressed by a developing body of international humanitarian law. More than seven years after the NATO intervention, Kosovo is still a province with a suspended legal status, suffering from severe economic, financial, and social uncertainty, which in turn breeds unemployment and lack of foreign investment. Those governing Kosovo are of dubious democratic legitimacy; various Special Representatives of the Secretary-General, and not elected officials, have created the law of the land. More importantly, Kosovo’s inhabitants are growing impatient with the delays and insecurities involved in the process of developing a sustainable resolution of Kosovo’s legal status, creating a degree of volatility in the region that threatens to undo the benefits

1. It is worth mentioning that United Nations Security Council Resolution 1244 recognizes the sovereignty of FRY over Kosovo and does not mention Serbia. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). However, when the FRY transformed into the Union of Serbia and Montenegro, the Constitutional Charter of the State Union stipulated that upon dissolution of the Union, all duties having belonged previously to the FRY, especially with respect to Resolution 1244, would be transferred to Serbia as the successor-state. CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO art. 60, available at http://www.mfa.gov.yu/Facts/const_scg.pdf.

2. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT’L L. 516, 517 (2004).

of the original act of humanitarian intervention.³ Riots in March of 2004—fueled by frustration and fear over “the international community’s intentions for Kosovo, UNMIK’s inability to kick-start the economy and its suspension of privatisation, and Belgrade’s success over recent months in shredding Kosovo Albanian nerves”⁴—left 19 dead, nearly 900 injured, and roughly 4500 people displaced. Increased anxiety over the Status Talks fueled another demonstration of a few thousand people in Priština/Prishtinë on November 28, 2006, the Albanian national flag day, led by the Vetëvendosja (“Self-Determination”) movement. The demonstration, at which the crowd smashed windows and threw paint at government buildings, had to be contained by police use of teargas.⁵

The Status Talks

The Security Council Resolution that established the international presence in Kosovo does not mention self-determination, but rather autonomy and self-government.⁶ Recognizing the need for the eventual settlement of the legal status of Kosovo, the Resolution provides for a “political process designed to determine Kosovo’s future status.”⁷ To commence this “political process,” the Security Council in late 2005 authorized the Secretary-General’s appointment of former Finnish President, Martti Ahtisaari, to head a process that would determine the status of Kosovo by the end of 2006.⁸ Though not completely stalled, the process has been delayed. Since July 2006, representatives from the Serbian government (including representatives of Kosovo Serbs), the Kosovo delegation (including opposition representatives), and the so-called Contact Group (France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States) have been meeting to decide on a peaceful settlement of the question of Kosovo. The overall framework for the future status, as set by the Contact Group in January 2006, contains “three no’s”: no return to the status Kosovo had until 1999, no union with any other country, and no partition. The Contact Group has also intimated that the future status should be, “inter alia, acceptable to the people of Kosovo.”⁹ A brokered political agreement, however, has proven much more elusive than was first thought. In fact, on November 10, 2006, Ahtisaari issued a statement further postponing even the mere presentation of his

3. See LULZIM PEÇI, ILIR DUGOLLI & LEON MALAZOGU, *NEGOTIATING KOSOVO’S FINAL STATUS 3* (2006) (commenting on the vague and conflicting mandate of the international administration in Kosovo with, on the one hand “substantial autonomy as provided by UNSCR 1244 and[, on the other,] state-building aspirations of . . . Kosovo’s elite and its overwhelming majority.”).

4. INTERNATIONAL CRISIS GROUP, *COLLAPSE IN KOSOVO*, EUROPE REPORT NO. 155, at i (2004) [hereinafter *CRISIS GROUP, COLLAPSE*].

5. *Kosovo Protesters Attack UN Site*, BBC NEWS, Nov. 28, 2006, <http://news.bbc.co.uk/1/hi/world/europe/6193464.stm>.

6. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

7. *Id.*

8. The Security Council also established the United Nations Office of the Special Envoy of the Secretary-General for the future status process for Kosovo (UNOSEK) in Vienna to support the activities of Mr. Ahtisaari.

9. See Statement, Kosovo Contact Group (Jan. 31, 2006), http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/declarations/88236.pdf.

proposed settlement to the Security Council until after the Serbian parliamentary elections on January 21, 2007.

The developments of the Status Talks have been shrouded in mystery. Discussions are neither published nor public and no effort has been made to involve any wide spectrum of the population on either side of the UNMIK border. It was only in late October 2006 that a member of the Contact Group leaked Mr. Ahtisaari's draft proposals to the Kosovar media.¹⁰ The goal of the United Nations Office of the Special Envoy of the Secretary-General for the future status process for Kosovo (UNOSEK) when it commenced work in early 2006 was to bring to a convergence the views of officials in Pristina/Prishtinë and Belgrade, respectively, on the so-called "'technical' aspects of Kosovo's status package: decentralization, minority community rights, protection of cultural and religious sites, and 'untangling competing claims on state property and debt between Kosovo and Serbia.'" ¹¹ The final package would be approved by a resolution of the Security Council. The talks have proven quite arduous and ridden with conflict. There is much on which Pristina/Prishtinë and Belgrade do not agree, but the two main sticking points are the constitutional status of Kosovo and the question of its territorial partition.

The Constitutional Status of Kosovo

The burden of declaring the province severed from Serbia (or, in more controversial parlance, declaring it "independent") would fall on the Security Council's final resolution—endorsing Ahtisaari's package, winding down UNMIK, and establishing the details of a successor international presence—and a declaration of the elected assembly of Kosovo. Ahtisaari's package will most likely avoid the controversial label "independence," a term vigorously opposed by Serbia. However, Ahtisaari's proposal could potentially amount to independence in substance.¹² Virtually ignoring Serbia's new constitution declaring Kosovo to be an "integral" part of the country,¹³ the package implicitly severs Kosovo from any constitutional relationship with Serbia. Kosovo would have treaty-making powers, meaning that it could join the IMF, and other international bodies, including the United Nations itself.¹⁴ However, the proposal is unlikely to mandate explicitly the creation of a foreign ministry or a U.N. seat. A wide range of international community prerogatives, such as the creation of an UNMIK-successor office with

10. One constant source of information on the talks has been the International Crisis Group (ICG), an independent, non-profit, non-governmental organization. ICG, with nearly 120 staff members on five continents, works through field-based analysis and high-level advocacy to prevent and resolve deadly conflict. Known for its quality and thorough work, it has received much praise, notably, from U.N. Secretary-General Kofi Annan and former U.S. Secretary of State Colin Powell. For more information, see <http://www.crisisgroup.org/home/>. ICG has regularly produced reports on Kosovo. It recently published an in-depth exposé of the situation in Kosovo and the development of the Status Talks, building on information gathered from the media as well as interviews with members of the respective delegations and the Contact Group members. CRISIS GROUP, *COLLAPSE*, *supra* note 4.

11. See INTERNATIONAL CRISIS GROUP, *KOSOVO STATUS: DELAY IS RISKY*, EUROPE REPORT N°177, at 1 (2006) [hereinafter CRISIS GROUP, *KOSOVO STATUS*].

12. See *id.* at 3.

13. William J. Kole, *Serbia Shrinks, Sinks into Dejection*, WASH. POST, Nov. 19, 2006.

14. See CRISIS GROUP, *KOSOVO STATUS*, *supra* note 11, at 3.

substantial powers, under the umbrella of European Union, will almost certainly be implemented.

The Question of Partition

The issue of minority community rights is of utmost importance, given the Contact Group's implicit understanding that "the main purpose of the Vienna process has been to find a viable future for Kosovo Serbs within an independent Kosovo."¹⁵ Though much remains to be done, the PISG have made consistent and good-faith efforts to fulfill the standards set by the international community, among which are minority rights, at least as far as legal guarantees are concerned.¹⁶ In the Status Talks, the trickiest issue is Serb-dominated northern Kosovo and its administrative center, the town of Mitrovicë/Mitrovica. If independence is insisted on, the Serbian fallback position is to partition Kosovo, absorbing northern Kosovo and Mitrovicë/Mitrovica into Serbia. However, the Kosovar Albanian position deems such a solution unacceptable, as it would mean severing close to a fifth of Kosovo's 4213 square miles. UNOSEK seems to stand behind the international community's repeated assertion that Kosovo will not be partitioned, as it has treated Mitrovicë/Mitrovica and the north generally with the rest of the decentralization questions.

Though the international community and the Western Contact Group members, in particular, have repeatedly expressed their support for some sort of independence for a non-partitioned Kosovo, the political process provided by the Security Council's Resolution 1244 is proving cumbersome, and its in-built delays, dangerous. Serbia, backed by the Russian veto in the Security Council, is actively trying to delay any compromised outcome indefinitely, possibly for domestic political gains. In fact, frustrated with Belgrade's uncompromising positions, Ahtisaari's July and September 2006 Reports to the Security Council criticized Belgrade for its inflexibility while giving Priština/Prishtinë credit for making concessions and being cooperative.¹⁷

Even though the Albanian delegation in the Vienna talks has proven accommodating, the Kosovar population at large is much less patient. The Kosovar Assembly has threatened to declare independence unilaterally, once in 2003 and again in 2005, but has pulled back both times.¹⁸ Indeed, the Kosovar Albanians have some tradition of self-government. After 1989, when Serbia abolished Kosovo's autonomy, the Kosovar Albanians created an extensive and functioning parallel government.¹⁹ An illicitly elected Kosovar Assembly first declared its independence in 1991, albeit only recognized by the Republic of Albania. Thus, Kosovo has been moving forward with self-government for quite some time. Complicating matters further, anxiety has

15. *See id.*

16. *See* The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, delivered to the Security Council*, U.N. Doc. S/2206/707 (Sept. 1, 2006).

17. *See* CRISIS GROUP, *KOSOVO STATUS*, *supra* note 11, at 3.

18. *Id.* at 1.

19. The nature of this parallel government was quite unique: It held elections, ran Albanian-language schools, raised taxes, provided healthcare, and more. MIRANDA VICKERS, *BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO* 259 (1998).

seized many segments of Kosovar society. The “Vetëvendosja” movement has drawn in many young and well-educated people as a result—people impatient with the lack of democratic accountability and the deplorable political situation. More alarming is that in the event of further delays of the Status Talks, there is the potential for reaction by those segments of the population affiliated with the former Kosovo Liberation Army (KLA). These include both war veterans and certain organized political parties that could use popular discontent to cause an uprising or revolt in the face of status uncertainties.

The Dilemma of the Legality of Humanitarian Intervention

The lawfulness of NATO’s 1999 humanitarian intervention in the FRY was widely discussed and questioned at the time. The debate continues. NATO did not have the Security Council’s explicit authorization to intervene militarily in a sovereign state (FRY), even though that state was engaged in the widespread violation of the human rights of its own citizens, who were ethnic minorities (Albanian) confined to a single province (Kosovo). However, the Security Council had previously condemned the human rights violations being perpetrated in Kosovo.²⁰ Furthermore, neither the Security Council, nor the General Assembly, nor the Secretary-General condemned the intervention as a violation of the legal principle of state sovereignty,²¹ though these institutions had done so on previous occasions of intervention.²²

The legality of humanitarian intervention remains uncertain,²³ due to the unresolved conflict between human rights and state sovereignty.²⁴ However, the egregious human rights violations of recent years have taught us that humanitarian interventions are a critical tool for alleviating human suffering, and that the international community does not (or should not) always see state sovereignty as more sacred than human life. Some now go so far as to argue that sovereignty should be refashioned as a state’s *responsibility* for human life within its borders.²⁵ International actors are paying increasing attention to an emerging norm in international customary law that would legitimize and codify humanitarian intervention law.²⁶ The profile of these efforts was raised by an official recognition in the High Level Panel report, *A More Secure*

20. See S.C. Res. 1239 U.N. Doc. S/RES/1239 (May 14, 1999); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

21. See Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 238 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

22. For example, the U.S. interventions in Grenada (1983) and Panama (1989-1990) were condemned by the General Assembly as a violation of international law. See also SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 83-144 (1996).

23. See SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY (2005); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe and Robert O. Keohane eds., 2003); SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996).

24. Reisman, *supra* note 2.

25. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

26. See *id.*; INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

World, commissioned by the U.N. Secretary-General. The report identified an emerging international norm of a "responsibility to protect" when faced with humanitarian disasters, a responsibility vested in the international collective but exercisable by the Security Council.²⁷

Self-Determination in the Aftermath of a Humanitarian Intervention

A related issue, becoming thornier by the day, has compounded this topic: What happens *after* the humanitarian intervention? By virtue of having intervened, the international community has taken upon itself certain responsibilities extending into the period after the intervention.²⁸ Walter Clarke and Jeffrey Herbst have called the notion that intervention does not affect domestic politics an illusion.²⁹ As Susan Breau recognizes, the United Nations may have implied powers to engage in nation building after an intervention, but "[it] also ha[s] a responsibility to develop clear legal guidelines for such an endeavor" lest it become a colonial power.³⁰ The present precarious situation in Kosovo should counsel the international community that any further elucidations on international humanitarian intervention law would be woefully deficient absent accounting for the aftermath of the intervention.

What is to become of Kosovo? The principle of state sovereignty and its corollary of territorial integrity is the cornerstone of the Westphalian system. Just as importantly, self-determination is now "considered a general principle of international law."³¹ In the case of Kosovo, the exercise of self-determination would certainly lead to secession, thus violating the principle of territorial integrity of the sovereign, Serbia. In this case, I argue that emerging international law should favor the right to self-determination over sovereignty claims. The legitimacy of the sovereignty claims upon which self-determination would infringe has been discredited already by virtue of the decision to intervene in the first place. In the case of Kosovo, the Serbian government had an extensive record of violating the human rights of the Albanian population, corroding their claims to sovereignty over Kosovo.³² A consensus-based political process in the case of Kosovo has allowed the political elite of a state previously condemned for human rights violations to hold hostage the prosperity and stability of the people whom they have wronged. The drawbacks of this scenario are clear in Kosovo's uncertain and risky political process. The international community must build the tools to engage the question of self-determination in order to ensure as direct a route to reconstruction and return to normality as possible in the aftermath of future

27. Secretary-General's High Level Panel on Threats, Challenges, and Change, *A More Secure World*, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004).

28. See THE RESPONSIBILITY TO PROTECT, *supra* note 25, at xi (arguing for a responsibility to rebuild and "addressing the causes of the harm the intervention was designed to halt or avert.").

29. Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, 75 FOREIGN AFFAIRS 70, 74 (1996).

30. SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 362 (2005).

31. Reference re: Secession of Quebec, [1998] S.C.R. 217, *reprinted in* INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 194 (W. Michael Reisman et al. eds., 2004).

32. This is evidenced in several Security Council Resolutions. See *supra* note 20.

humanitarian interventions.

Small States, Big Veto: Customary International Law in the WTO After EC—Biotech. By Mark Wu

As the expanse of the World Trade Organization's (WTO) jurisprudence grows, so too does the potential for conflict with customary international law. For the past six years, the accepted relationship between the two was that laid out in the *Korea—Government Procurement* dispute: "[C]ustomary international law . . . applies to the extent that the WTO treaty agreements do not 'contract out' from it."¹ In other words, provided there is no inconsistency between what is accepted as customary international law and WTO law, generally recognized principles of international law can supplement gaps in the WTO Agreements. Subsequently, several WTO decisions appeared to reinforce this principle.

This era of harmony between customary international law and WTO law may be coming to a close, due to a recent WTO panel decision that has arguably raised the bar for what may count as a "rule of international law" in the WTO context. The Panel's decision in the *EC—Biotech* dispute, publicly issued on September 29, 2006, suggested that in order for a "rule of international law" to be considered in a WTO dispute, that rule must have been ratified by all parties of the WTO agreement being interpreted.² This Recent Development argues that this narrowing of the definition of applicable customary international law is a step too far, and explores potential alternatives to the standard endorsed by the *EC—Biotech* Panel.

At the heart of the *EC—Biotech* dispute, ongoing since May 2003, are two European Community (EC) directives regulating the approval of biotech products. One regulates the "deliberate release into the environment of genetically modified organisms," while the other regulates "novel foods and novel food ingredients."³ Both directives are based on the notion of the precautionary principle: that is, if there is the potential for severe or irreversible consequences, the burden should rest on biotech producers to show that their products are safe before product authorization is granted. This approach runs counter to the standard in other developed countries where a regulatory agency must have some scientific evidence of a potential harmful effect before it can deny product approval. In addition, several European countries enacted their own import restrictions on biotech products.

The United States, Canada, and Argentina cried foul. Along with fifteen other countries,⁴ they alleged that these European standards constituted a de

1. Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000).

2. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.68-7.70, WT/DS291-293/R (Sept. 29, 2006) [hereinafter Panel Report, *EC—Biotech*].

3. Council Directive 2001/18, pmbl., 2001 O.J. (L 106) 1 (EC); Council Regulation 258/97, pmbl., 1997 O.J. (L 043) 1 (EC).

4. The third-party countries that joined this dispute are Australia, Brazil, Chile, China, Colombia, El Salvador, Honduras, Mexico, New Zealand, Norway, Paraguay, Peru, Chinese Taipei (i.e., Taiwan), Thailand, and Uruguay. See Panel Report, *EC—Biotech*, *supra* note 2, ¶ 1.13.

facto moratorium on approval of biotech products.⁵ This represented an undue delay in violation of the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") as well as several other WTO provisions. In its defense, the Europeans turned to two treaties: the 1992 Convention on Biological Diversity (the "CBD"), and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the "Biosafety Protocol").

Within the Biosafety Protocol are specific provisions allowing for the application of the precautionary principle to biotech products. These provisions note that a party to the Protocol should not be prevented from enacting trade restrictions simply because of the "[l]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity"⁶ Instead, parties are permitted to take "into account risks to human health" and enact precautionary restrictions "as appropriate . . . in order to avoid or minimize such potential adverse effects."⁷

Essentially, the Europeans argued that their regulations were consistent with their WTO obligations because the Biosafety Protocol is customary international law that complements WTO law. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, treaty interpretation should take into account "any relevant rules of international law applicable in the relations between the parties."⁸ The question for the WTO was whether the CBD and the Biosafety Protocol met the requirements necessary to constitute a "relevant rule of international law."

The Panel in *EC—Biotech* ruled that it did not. It agreed that, in theory, a treaty such as the CBD and its subsequent Biosafety Protocol could qualify as a rule under Article 31(3)(c).⁹ But it then applied a strict textualist interpretation of this Article. According to the Panel's interpretation, in order to qualify as a rule, the treaty or customary international law must be "applicable in the relations between the WTO members."¹⁰ The Panel clarified that this did not simply mean "one or more parties."¹¹ Nor did it mean just the "parties to the dispute."¹² Rather, the Panel declared that "it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between *all* parties to

5. See *id.* ¶ 4.10.

6. Cartagena Protocol on Biosafety to the Convention on Biological Diversity arts. 10.6, 11.8, Jan. 29, 2000, 39 I.L.M. 1027, available at <http://www.biodiv.org/doc/legal/cartagena-protocol-en.pdf>.

7. *Id.*

8. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

9. See Panel Report, *EC—Biotech*, *supra* note 2, ¶ 7.67 ("In our view, there can be no doubt that treaties and customary rules of international law are 'rules of international law' within the meaning of Article 31(3)(c).").

10. *Id.* ¶ 7.68.

11. *Id.*

12. *Id.*

the treaty which is being interpreted.”¹³ Essentially, the Panel appears to suggest that before a principle of customary international law can be applied in interpreting WTO law, it must be embraced by *all* WTO members.

In this case, the net result was that neither the CBD nor the Biosafety Protocol met the Panel’s requirement. At the time of the Panel decision, the CBD had been joined by 189 countries, including all parties to the dispute, but not yet ratified by the United States.¹⁴ Therefore, the Panel ruled that the CBD “is not ‘applicable’ in the relations between the United States and all other WTO Members.”¹⁵ The same was true of the Biosafety Protocol, which only 135 countries had ratified at the time of the decision.¹⁶ Of the complaining parties, Argentina and Canada had both signed but not ratified the Protocol, while the United States had not even signed it. The Europeans emphasized that the Americans nevertheless participated in the Protocol’s Clearing-House Mechanism,¹⁷ but the Panel concluded that this was not enough. Based on these facts, the Panel “deduced” that the Biosafety Protocol was also “not ‘applicable’ in the relations between . . . WTO Members.”¹⁸ As a result, the Panel refused to consider principles contained within the CBD and the Biosafety Protocol in resolving this dispute.

The Panel ruling in *EC—Biotech* represents a significant departure from past WTO practice. In previous cases, the WTO’s Appellate Body (AB) was more than willing to consider treaties that it viewed as constituting customary international law—but that were not necessarily signed by all WTO members—in determining the meaning of WTO law. For example, in the *Shrimp/Turtle* case, the Appellate Body turned to the U.N. Convention on the Law of the Sea (UNCLOS) to determine the scope of the term “natural resources.”¹⁹ At the time of the decision, UNCLOS had been ratified by 126 countries, but not by the United States, which was a party to the dispute.²⁰ In that sense, UNCLOS’s status was no different than the CBD’s or Biosafety Protocol’s status in *EC—Biotech*. In addition, the WTO has also been willing to turn to bilateral and regional trade agreements entered into by select parties

13. *Id.* ¶ 7.70 (emphasis added). Note, however, that in ¶ 7.72, the Panel explicitly states that it is not taking a position on the scenario “in which relevant rules of international law are applicable to all parties to the dispute, but not all WTO members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in light of these other rules of international law.”

14. See U.N.E.P. Secretariat of the Convention on Biological Diversity, Parties to the Convention on Biodiversity / Cartagena Protocol on Biosafety, available at <http://www.biodiv.org/world/parties.asp>.

15. Panel Report, *EC—Biotech*, *supra* note 2, ¶ 7.74.

16. See U.N.E.P. Secretariat of the Convention on Biological Diversity, Cartagena Protocol on Biosafety (Montreal, 29 January 2000), Status of Ratifications and Entry into Force, <http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=ctr>.

17. The Clearing-House Mechanism is a mechanism coordinated by the U.N. Environment Programme to promote and facilitate the exchange of information related to biodiversity. For more information on the Mechanism, see U.N.E.P. Secretariat of the Convention on Biological Diversity, Clearing House Mechanism, <http://www.biodiv.org/chm/default.aspx>.

18. Panel Report, *EC—Biotech*, *supra* note 2, ¶ 7.75.

19. Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶ 130, WT/DS58/AB/R (Oct. 12, 1998).

20. See U.N. Division of Ocean Affairs and Law of the Sea, Status of the U.N. Convention on the Law of the Sea, http://www.un.org/Depts/los/reference_files/status2006.pdf.

as a “supplementary means of interpretation,”²¹ or “for the purpose of interpreting an ambiguous WTO provision.”²² In fact, the prevailing principle has been to apply customary rules so long as there is “no conflict or inconsistency” with the WTO agreements.²³

This leads to two interesting questions. First, how did the *EC—Biotech* Panel distinguish this case from past precedents? The Panel never addresses this question head-on. The only place where the *EC—Biotech* Panel discusses the consistency of its ruling with other WTO decisions is in a footnote, and even there, it focuses only on its consistency with those WTO decisions that interpret the Vienna Convention’s Article 31(3).²⁴ It simply ignores *Shrimp/Turtle*, *Korea—Government Procurement*, and other cases where the WTO embraced international law more generally in interpreting its own law.

Were the Panel to attempt to distinguish its ruling, it might have made the following type of argument. In *Shrimp/Turtle*, *Korea—Government Procurement*, *Korea—Beef*, and other cases, the Appellate Body turned to customary international law simply to help it resolve the meaning of an ambiguous term in WTO law. In this case, however, the Europeans were not asking the Panel to rely on the CBD or the Biosafety Protocol to resolve the meaning of a term in the SPS Agreement. Instead, they were asking the Panel to import a legal principle from another international agreement—the precautionary principle—into WTO law. The Panel could have argued that this task is inherently different from simply turning to customary international law as an interpretive aid. Such a delineation would have been helpful in establishing how *EC—Biotech* could coexist with previous WTO precedents that embraced international treaties to which not every WTO member belonged. This distinction is never made, however. Indeed, the entire question of whether the *EC—Biotech* panel ruling is to co-exist with previous WTO precedents, and if so how, is simply glossed over.

The second unresolved question is why the Panel chose to raise the bar. Why did it now require that all WTO members embrace a rule of international law before it could be considered when previous adjudicators had not? On this question, the *EC—Biotech* Panel provides a clear response. It explicitly states that its actions are designed to “ensure[] or enhance[] the consistency of the rules of international law applicable to . . . States and thus contribute[] to avoiding conflicts between the relevant rules.”²⁵ In other words, the Panel seeks to avoid creating a scenario whereby a state finds itself bound, in a WTO forum, by an international rule to which it had not yet chosen to bind itself through ratification. Its vision is thus of a pure “opt-in” system rather than of any imposition of customary international law on states by multilateral legal institutions.

21. Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 83, WT/DS69/AB/R (July 13, 1998).

22. Panel Report, *Korea—Measures Affecting the Imports of Fresh, Chilled, and Frozen Beef*, ¶ 539, WT/DS161/R (July 31, 2000).

23. See *supra* note 1 and accompanying text.

24. See Panel Report, *EC—Biotech*, *supra* note 2, p. 333 n.243 (focusing on how its interpretation is similar to the Appellate Body’s interpretation of the meaning of “the parties” in Article 31(3)(b) in *EC—Chicken Cuts*).

25. *Id.* ¶ 7.70.

This vision has generated a considerable backlash from the small community of international law scholars that has scrutinized it. For a multilateral body prone to diplomatic language, the U.N. General Assembly's International Law Commission (ILC) was sharply critical. It noted that the new standard "makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) would ever be allowed."²⁶ The ILC then proceeded to criticize the WTO Panel for willingly undoing "the consistency of the multilateral treaty system as a whole" simply to "buy[] what it calls the 'consistency' of its interpretation of the WTO treaty."²⁷ It condemned the decision as effectively rendering the WTO agreements isolated "'islands' permitting no references *inter se* in their application."²⁸

The *EC—Biotech* Panel standard is prone to two further criticisms as well. First, it creates a single-party veto, for so long as a single party holds out, that party can effectively veto the application of customary international law to WTO law. This single-party veto system already applies to some aspects of the WTO regime (e.g., the admission of new members), but to give a single small state the power to eliminate any role for customary international law in the WTO is extreme. Adjudicators should be given some flexibility in interpreting ambiguous texts, and that flexibility should include the ability to turn to other widely-accepted international legal texts as interpretive aids.

Second, the standard creates an additional barrier for admitting new members to the WTO. Existing members are now more likely to scrutinize the set of treaties to which an applicant is a party. This gives existing members greater leverage to demand that the applicant ratify certain treaties as a condition of accession, because if it did not, admitting that member would make that treaty inoperative in the WTO context. The price of WTO admission—already high—continues to increase.

What then should be done to fix this problematic standard created by the *EC—Biotech* Panel? The United Nations's ILC Report suggests that the answer lies in changing the standard to permit reference to another treaty so long as all parties in the dispute are also parties to the other treaty.²⁹ This proposal has its own problems, however. Consider, for example, a multilateral treaty that has been ratified by only ten countries. Under this proposal, the WTO could consider the principles to be customary international law in a WTO dispute where all the parties are among the treaty's ten signatories. But should a principle be recognized as such if it is embraced by so few countries—or alternatively, only by OECD countries, or ASEAN countries?

A better alternative would be for the WTO to set a numerical threshold that answers the question of when the principles in another multilateral agreement can be considered customary international law under Article 31(3)(c) of the Vienna Convention. This threshold could be when a majority

26. International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, ¶ 450, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

27. *Id.*

28. *Id.* ¶ 471.

29. *Id.* ¶ 472.

of WTO members have ratified the treaty. Or the threshold could be set even higher, for example, at two-thirds of members. A threshold approach provides a clear and straightforward means of informing all parties of when another non-WTO agreement could be incorporated into WTO jurisprudence.

Second, the WTO should continue to require that all parties to the dispute be parties to the agreement—as both the *EC—Biotech* Panel and the United Nations's ILC have urged. By preventing the multilateral regime from imposing new international legal obligations on parties that have not consented to them, this principle eliminates a likely threat to the long-term stability and legitimacy of the WTO. This rule should be a default, subject to waiver by disputants who have not ratified the non-WTO treaty being considered but who nevertheless agree to its application in a particular WTO dispute. This is likely to occur when a principle of customary international law works in the disputant's favor, despite the fact that the disputant has yet to embrace that specific principle. The United States faced this precise circumstance in *Shrimp/Turtle*. It had not signed or ratified UNCLOS, and yet, the UNCLOS interpretation clearly cut in its favor. Under such circumstances, the WTO adjudicators would ask the non-signatory whether it was nonetheless willing to accept certain provisions of the treaty at hand to be customary international law. Provided it would do so (or had done so in a previous dispute), the WTO would then apply those provisions as a rule under Article 31(3)(c). In the long run, providing such an exception should foster the gradual expansion of customary international law. It creates incentives for states to openly acknowledge that certain parts of treaties are indeed customary international law, without needing to accede to a controversial treaty as a whole.

Were *EC—Biotech* and the earlier WTO precedents judged by this proposed standard, the outcomes would remain unchanged. In *EC—Biotech*, the WTO would still deem the CBD and the Biosafety Protocol to be inapplicable, but simply because those instruments had not reached the specified threshold to be considered as customary international law. On the other hand, UNCLOS and other multilateral treaties previously embraced by the WTO would meet the standard, and they have therefore been correctly applied previously by the Appellate Body.

The above proposal guarantees greater consistency and predictability regarding circumstances in which the WTO may turn to customary international law for gap-filling, without advancing the stark requirement of the *EC—Biotech* Panel that every single WTO member embrace the rule in question. Nor does the proposal in this Recent Development pose the problem inherent in the ILC's proposal, namely that WTO panels should consider rules not widely embraced by its members as customary international law. The proposal also eliminates the destabilizing threat of a single-party veto, and does not impact accession decisions in most instances. In other words, it accomplishes the Panel's goals, but through more constructive means.

In today's interdependent world, where multiple fora exist for creating international law, the *EC—Biotech* Panel's standard—that law established in a different forum must be embraced by all WTO members before it can be

considered for incorporation—is simply unrealistic. Behavior need not be embraced by all before it becomes custom. The same should be true of international law. Retaining the Panel’s unrealistic standard will effectively isolate the WTO regime from other bodies of international law. Undoing this standard should be near the top of the Appellate Body’s future agenda.

